

Waterway and Wetland Handbook

CHAPTER 190

FLOATING BOGS

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INTRODUCTION

What are floating bogs? Why are we concerned with them?

A "floating bog" is a mass of aquatic vegetation not firmly rooted to the lakebed. Because they are not firmly rooted, floating bogs rise and fall with variations in lake level. They may move dramatically during storms or after ice breakup. Floating bogs several acres in size are not uncommon. They may be driven across a lake simply by wind pressure against standing trees. Floating bogs are typically the most trouble on raised lakes. In the famous Lake Chetek case, a bog of about 10 acres was pushed across Lake Chetek, and had to be removed by the National Guard. These bogs may cause serious injury to persons, property, or structures.

We are mainly concerned with "problem" bogs. A variety of statutes and administrative rules indirectly regulate floating bogs. The major problem with regulating floating bogs is that ownership of the bogs has never been legally established so liability for bog-related problems can rarely be established.

FORMATION OF FLOATING BOGS

Floating bogs are natural phenomena of many acid marshes in northern and eastern Wisconsin. Floating bogs are occasionally found in southeastern Wisconsin, although they are far more common in the north.

Floating bogs follow a typical bog pattern of succession, from a mass of grasses, reed and leatherleaf to an intermediate tamarack type swamp, to a cedar, swamp maple and pine climax bog. At some point, the floating bog may gain status as land and becomes the property of the adjoining riparian. The point where the bog becomes land is difficult to determine, requiring biological and physical field observations.

Another type of floating bog results from the flowage of lands which include wetland cattails or similar bogs. Soils associated with this complex are often buoyant. The root mat is often interlaced to the point that large sections of this type of bog can rise up and float in a new impoundment (e.g. Day Lake, Ashland County). Sections of lake-edge bog also are often torn loose by wave action or ice action (e.g. Lake Poygan, Winnebago County).

EVOLUTION OF LAW AND REGULATIONS

Two Supreme Court cases express the current state of the law on floating bogs. In Attorney General ex rel. Becker v. Bay Boom Wild Rice and Fur Company, 172 Wis. 363 (1920), the Supreme Court defined floating bog. State v. Lamping, 36 Wis. 2nd 328 (1967) refined the definition to the following:

" . . . In fact, however, floating bog is a mass of grass, reeds, and other aquatic vegetation which grows and floats on the surface of water in warm weather, which may become frozen into the ice during the winter, and upon the recurrence of high stages of water is carried on its surface, is broken off, and may be moved by the winds and currents to deep waters, where it is ground to shreds and disappears as sediment on the bed of the water. When it so floats and before it is so destroyed and deposited on the water bed, it is in no sense soil or land. Wherever it forms in the summer season it indicates that there is a substantial amount of water between it and the soil forming the bed of the water . . ."

The Department interpretation of its responsibility under the statutes is found in two documents. An October 29, 1968, legal opinion established:

1. The opinion of Department experts can determine whether a mass of vegetation is a floating bog or not.
2. Ownership of a bog is uncertain while the bog is floating.
3. Once a bog becomes solid land, the riparian whose land it adjoins owns it.
4. If a bog is floating, it may be removed without a permit provided no bottom material is removed.
5. If a bog has become land, a 30.20 permit is required before it can be removed.

In a January 5, 1973, memorandum, several more points on floating bogs were made:

1. When removing a floating bog, all debris must be removed (30.125, Stats.). There must be adequate Department supervision during removal.
2. The bog may not be sunk with stone or any other material.

Subsequent opinions have reiterated the points established above.

APPLICABLE STATUTES

No statutes directly regulate activities involving floating bogs. The following statutes indirectly regulate activities which may involve floating bogs;

Endangered Species. Section 29.415, Stats., refers to endangered species lists and would prohibit the removal of a floating bog if it harbors species on the endangered species list.

Weed Cutting. Section 29.545, Stats., prohibits the cutting and harvesting of aquatic plants from certain specified bodies of water, without authorization from the Department.

Protected Plants. Section 29.546, Stats., refers to a variety of plants which, if found on the bog, would require authorization from the Department for removal.

Weed Control. Section 30.125, Stats., governs weed control in navigable waters. All weeds cut in navigable waters must be removed. Any person removing a portion of a bog must remove all bog material from the lake.

Temporary Booms. Section 30.15, Stats., allows for the placement of a temporary boom for the cutting of weeds obstructing navigation, provided Department consent is obtained.

Dredging. Section 30.20 allows dredging of a lake or stream, either by contract with the state or by permit.

APPLICABLE ADMINISTRATIVE RULES

Wetlands. NR 1.95, Wis. Admin. Code, establishes general standards to be applied by the Department in decisions affecting wetlands.

Shoreland Areas. NR 115, Wis. Admin. Code, establishes administrative standards to be followed by counties in their administration of shoreland zoning ordinances.

Dredging. NR 346, Wis. Admin. Code, specifies contract requirements for dredging of natural lakes and NR 347, which controls hydraulic dredging of watercourses.

LIST OF REGULATIONS

- a. Statutes: 29.415, 29.545, 29.546, 30.125, 30.15, 30.20
- b. Administrative Rules: NR 1.95, NR 115, NR 346, NR 347
- c. Manual Codes: None
- d. Court Cases:
 - 1. Attorney General ex rel. Becker v. Bay Boom W.R.&F. Co., 172 Wis. 363 (1920)
 - 2. State v. Lamping, 36 Wis. 2d 32P (1967)

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CORRESPONDENCE/ MEMORANDUM**STATE OF WISCONSIN**

DATE: January 30, 1989

TO: Matt Weidensee - SED

FROM: Dale Simon - WZ

SUBJECT: Ownership and Jurisdiction of Floating Bogs, Lake Nagawicka Waukesha County

Your January 13, 1989, memo to Ken Johnson raises four (4) basic questions regarding bogs. Hopefully, the following responses, which were also conveyed to Kathi Kramasz via telephone conversation on January 27, 1989, will adequately answer your questions.

1. Wasn't the floating bog a natural feature prior to the construction of the dam? Yes. Bogs generally take hundreds of years to develop. The raising of the lake level, after the construction of the dam, may have caused a bog that was once attached to the bed of the original lake to dislodge itself and become a floating mat of vegetation.
2. Considering that the dam construction may have raised water levels in the lake area, who owns the new lake bed in the area of the bog? I have to assume that the floating bog is located above that portion of the lake bed that was flowed as a result of the dam. Ownership of that portion of the lake bed that is flowed as a result of the dam is contingent upon the legal arrangements that were made by the dam owner when the dam was being constructed. Generally, ownership of the land that was flowed could either be in fee title by the dam owner or still owned by the adjacent riparian if the dam owner only obtained flowage easements. None the less, the original lakebed to the ordinary high water mark would be under state ownership. How you determine that specific area can be extremely difficult.
3. A preliminary field investigation was performed to determine the OHWM in the kettle area. What portions of the bog are below the OHWM? If the bog was floating then the entire bog is below the OHWM, therefore your determination is correct. Sometimes, you can have a situation where a bog can be located above the OHWM of a lake. These situations are for the most part rare and occur when groundwater discharges on an upland slope. As I understand your situation, this is not the case.
4. Is it possible for the riparian property owner to own a floating bog if they do not own the bed below the bog? No. The bog would in all likelihood be considered a floating mat of vegetation and considered a part of the water itself. Please refer to Chapter 190 of the Water Regulation Handbook for more information.

If you have any questions about the above or any other Chapter 30 or 31 related issues please contact me.

cc: Gary Nelson - SED
Bob Roden, Ken Johnson, Scott Hausmann - WZ